SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 757

IRVING FEINBERG AND MARK GODFREY,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The indictment in this case (Cr. 38514) was filed on November 19, 1941 against the petitioners and H. Vaughan Clarke and Prendergast-Davies Company, Ltd. It contained thirteen counts. Counts 1 to 8, inclusive, and Counts 10 to 12, inclusive, charged the petitioners and the other defendants with devising a scheme and artifice to defraud, and in furtherance thereof, of using or causing the United States mails to be used in violation of Title 18, United States Code, Section 338. Count 9 of the indictment charged the petitioners and the other defendants with the sale of stock in connection with said scheme by the use of the United States mails and means of transportation in

interstate commerce, in violation of Title 15, United States Code, Section 77 q (a). Count 13 of the indictment charged the petitioners and the other defendants with conspiring to commit the offenses alleged in Counts 1 to 12, inclusive, in violation of Title 18, United States Code, Section 88.

The petitioners and the other defendants pleaded not guilty on the 1st day of December, 1941.

The trial began March 24, 1943 and continued through April 14, 1943.

During the trial, Counts 2, 5 and 8 of the indictments were dismissed by the Court with the consent of the Government (R. 6).

On April 14, 1943, the jury rendered a verdict of guilty against each defendant, except Prendergast-Davies Company, Ltd., on Counts 1, 3, 7, 10, 11, 12 and 13, and not guilty on Counts 4, 6 and 9. No verdict was rendered as to Prendergast-Davies Company, Ltd., and the indictment against it was dismissed on motion of the Government (R. 6).

On April 22, 1943, petitioner Irving Feinberg was sentenced to a term of imprisonment for a period of one year and six months on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of $150 on each of Counts 1, 3, 7, 10, 11 and 12, and to pay a fine of $100 on Count 13. The petitioner, Mark Godfrey, and defendant, Clarke, were each sentenced to a term of imprisonment for a period of ninety days on each of Counts 1, 3, 7, 10, 11, 12 and 13, sentences of imprisonment to run concurrently, and to pay a fine of $150 on Counts 1, 3, 7, 10, 11 and 12 and to pay a fine of $100 on Count 13. Each petitioner stands committed until said fines are paid or otherwise discharged according to law and without costs (R. 1247-1250).

Notice of appeal was filed by each of the petitioners on the 22nd day of April 1943 (R. 1509-1512). Irving Fein-

berg was released on bail of $5,000, and Mark Godfrey was released on bail of $2,000 on that date, pending appeal. On the 17th day of May, 1943, the defendant H. Vaughan Clarke surrendered to the United States Marshal for execution of his sentence and did not appeal.

An appeal was duly taken by the petitioners from the judgments of conviction to the United States Circuit Court of Appeals for the Second Circuit (R. 1509). Among the errors assigned are those which are argued in this brief and set forth in the petition herein.

The Circuit Court of Appeals affirmed the judgments so appealed from on January 31, 1944; on February 7, 1944, the issuance of the mandate thereunder was stayed, pending this application, by order of the Circuit Court of Appeals for the Second Circuit. The opinion of the Circuit Court of Appeals was written by Hon. Learned Hand and was concurred in by all the Judges.

Petition for Rehearing was filed on February 9, 1944, and was denied, per curiam, on February 14, 1944 (R. 1568).

The Circuit Court's order for a mandate of affirmance is dated February 16, 1944 (R. 1569).

ARGUMENT.

Point I.

The prosecuting attorney, during the course of the entire trial, made highly unfair, improper, prejudicial and inflammatory statements, by reason of which the petitioners did not receive a fair trial.

From the time the indictment was found through the summation of the Prosecuting Attorney, attempts were made to give the business transaction of these petitioners an unjustifiably vicious background.

A. The indictment, in paragraphs "7" and "8" (R. 11) declare that Prendergast-Davies Company, Ltd., was a cor-

poration "organized by John Torrio, alias John T. McCarthy, in 1933," and then went on to say that "In June of 1935, Irving Feinberg (petitioner) and his wife, Anne Feinberg, acquired from John Torrio, alias John T. McCarthy, the ownership and control of Prendergast-Davies Company, Ltd.

The said John Torrio is a notorious gangster and a criminal of the worst type. His name has been spread over all the newspapers in the country many times, particularly in New York City, *and even during the course of the trial* (Exhibits "A" and "B" of April 22, 1943, R. 1505, 1506).

Defense counsel specifically warned the Prosecuting Attorney, at the outset of the trial out of the presence of the jury, not to refer to John Torrio because it has "absolutely no connection with this case whatsoever" (R. 58).

During the examination of the Government witness Jacobs, the Prosecuting Attorney elicited information as to the former ownershp of Prendergast-Davies Company, Ltd., again solely for the purpose of bringing Torrio's name before the jury and so that he might, thereafter, comment upon it in his closing address. Defense counsel promptly moved for a mistrial. (R. 454, 455, 456).

It again became necessary for defense counsel to move for a mistrial when the Government counsel, in cross-examining the petitioner's witness Stempf, asked the following question and made the following statement (R. 1139, 1140):

> "Q. Suppose the management as it then was in 1934 and 1935 had some peculiar power over the people that were in the liquor business, that he could exact the profit that he wanted, wouldn't that be an important factor?
>
> Mr. Kleid: I object to that. There is no such testimony in the record.

Mr. Rubin: All we have in this record, your Honor please, is that in 1934 and 1935 Prendergast-Davies Company was run by John Torrio.

* * * * * * *

Mr. Kleid: There is no such testimony in the record."

It is apparent that the Government attorney worded his question and made the statement above quoted, so as to convey to the jury that Torrio, allegedly in control of Prendergast-Davies Company, Ltd., used racketeering methods in operating that corporation prior to 1935 and that the petitioner, Feinberg, succeeded him and had an association with him.

Despite the complete lack of evidence that Torrio operated Prendergast-Davies Company, Ltd., in 1934 and 1935 with "peculiar power over the people," (which implied the use of racketeering methods in the operation of said business), the Government counsel, in his summation, once more linked Feinberg with this notorious gangster and racketeer and stated that the said John Torrio was associated with Prendergast-Davies Company, Ltd., in 1934 and 1935 and operated that company. It should be noted that there is no testimony that Torrio had any connection with Prendergast-Davies Company, Ltd., at any time and it is conceded that Feinberg was not in the company before August, 1935.

With respect thereto, the Government counsel made the following statement in his summation:

(R. 1172) " * * * There was a man by the name of Torrio; he was running the P-D Company. He wasn't doing at all badly back in 1934 and 1935. There was a profit, a good profit, * * * And this fellow Torrio, he had something. He ran a business; he made a profit. I wasn't going to go into that, but they offered that contract here; they put that contract

in, between Slockbower and somebody else; but the real guy was Torrio, not Slockbower. And it showed how they did it. And this is what they did. Torrio wanted to get out of the business for reasons that he had, and he said 'O. K. Have you got the money to buy me out?' Feinberg didn't have the money. He said, 'I will tell you what. I will put up $30,000 out of the grand total of some $300,000, whatever it is.'

And the way they worked it was that Torrio just lifted out all his working capital, some $250,000; he lifted it right out of there and left the shell for Feinberg. They had volume, that's right. Torrio built up the volume in 1934 and 1935 * * *."

The seriousness of the error is even more apparent as to the petitioner Godfrey, for he never had any association or other connection with Prendergast-Davies Company, Ltd. and hence none with Torrio.

The District Court recognized that serious error had been committed in permitting comments about Torrio by the United States Attorney, but it did nothing to correct these errors except to omit the reference to Torrio contained in paragraphs "7" and "8" of the indictment, when he read the indictment to the jury during his charge and then, merely to say:

(R. 1198): "I have omitted some of that because it was not proven and there is no reason for dragging it in."

The Circuit Court's comment, in its opinion, was that "it was purest speculation whether any of the jury knew that Torrio was a notorious lawbreaker" (R. 1560) and that the remarks of the Prosecuting Attorney were "unhappy vulgarisms" (R. 1560). Its conclusion was:

(R. 1556): "It may be that the prosecution brought this out in the hope that some scandal might attach to Feinberg, but the chance that it succeeded is very tenuous."

These conclusions deny to the jury awareness of news spread over the front pages of Metropolitan newspapers on many occasions over a period of many years and overlook the possible effect of those remarks upon the jury. (See R. pages 1505, 1506 for articles referrring to Torrio published during the course of the trial.)

B. The Prosecuting Attorney, in his opening address, read from paragraph "27" of the indictment which alleged that the petitioner, Feinberg, had violated the laws relating to distilled spirits and that the petitioners concealed that fact from the stockholders of American Beverage Corporation. The Prosecuting Attorney knew, when he made that statement, that Feinberg had been indicted in *February, 1939,* charged with violating the laws relating to distilled spirits, for acts which took place seven years previously and that that indictment had been found after the alleged fraud in the instant case was completed; and he also knew that he had pleaded nolo contendere to one count of said indictment on *May 1, 1939,* and sentenced to pay a fine. During the course of the trial the Court ruled, out of the presence of the jury, that the Prosecuting Attorney would not be allowed to offer testimony relating to the aforesaid indictment and plea of Feinberg because it related to an indictment and plea which had occurred subsequent to the alleged fraud in the instant case and not prior thereto.

Furthermore, the prosecutor knew that he could not prove that the petitioners had knowledge, prior to February, 1939, that Feinberg was *about to be* indicted.

On February 6, 1939, there appeared in the newspapers an article to the effect that an indictment had been filed in the United States District Court for the District of Connecticut charging Feinberg with violation of the laws relating to distilled spirits. This was the first time the petitioners knew or could have known about such an indict-

ment and, therefore, they could not very well suppress what they had not known. Shortly after Feinberg's nolo contendere plea, and in due course, the Federal Alcohol Administration, the body in charge of the issuance of wholesale liquor permits, was notified.

Despite these facts, the prosecutor, in his closing address, referred to this newspaper article, which was not in evidence and which he could not put in evidence, and told the jury that Feinberg had been "caught in some wrongdoing."

> (R. 1159, 1160): "They worked out this deal and they thought they had it, they were sitting pretty, and then something happened. Something came out. It was adverse publicity. It was in the newspapers—and I haven't been permitted to prove what that was—but never mind what it was. It was adverse publicity, and it was bad, it was serious * * *
>
> And they demanded Feinberg do something about it. When that happens, adverse publicity, whatever that was, I am not allowed to tell you, when that happened, the cat was out of the bag; the fat was in the fire; * * * The fat was in the fire. They were scared stiff. They were caught, and so they scrambled around and they tried to get out from under; * * *
>
> * * * They caught Feinberg in something; he had made misstatements."

The Circuit Court of Appeals, in its opinion, completely missed the significance of the newspaper article. It mistakenly assumed that it "censured the purchase by A. B. C. of the P-D assets and the Graves shares," (R. 1556) and that because of that article the accused "were much troubled by the attack upon the transaction" (R. 1556). From this it drew the conclusion that the articles were competent and that "no harm was done" (R. 1556). If that Court had correctly understood the import of the article, it might have changed the entire attitude of the Court, in view of the heaping of error upon error in so close a case. The Circuit

Court conceded that the method of the Prosecuting Attorney was "improper if the articles themselves had been incompetent," (R. 1556) and clearly they were incompetent.

C. The Government attorney, in his closing address, told the jury that he "went over the record during the week-end and picked out bits of evidence, here and there, from the record," and "put the pages down, and made notes;" and that he "was going to give them the evidence in the case, not talk, not generalization, and not his recollection" (R. 1153, 1186).

At this point, Government counsel placed on the table in front of the jury, the transcribed testimony of witnesses in order to impress the jury that what he was saying was taken directly from the record (R. 1186).

Connolly's Testimony.

Connolly was a minority stockholder of American Beverage Corporation who attended the annual meeting of the American Beverage Corporation stockholders on January 17, 1939.

The Government counsel misquoted Connolly's testimony when he stated that he (Connolly) said:

> (R. 1155) "* * * 'Well, they told me that they were not going to pay Feinberg any salary; he didn't need a salary; he is a wealthy man. He is only interested in the company; he didn't need a salary.' * * * They said they were not going to give him a salary; * * *"
>
> (R. 1161) "* * * That is the record; it is in there. And what Connolly stated to you about how they said to him about Feinberg not getting a salary. That is in the record; it is uncontroverted."
>
> (R. 1171) "* * * Connolly said Feinberg didn't want the salary * * *"

Whereas, Connolly testified, as follows:

> (R. 431) "Q. Was it stated to you or anybody else at that meeting in your presence that the board of directors, the new board would right after that vote Mr. Feinberg a $30,000 salary? * * *
> A. No."

As to Mintzer.

The Government counsel stated:

> (R. 1163) "My goodness, they know what this thing is. Mintzer was fed up; he got out. I don't blame him. * * *
> He (Mintzer) finds out about that, and he gets all excited. 'Give us an indemnity.' And he made Feinberg put up 10,000 of these shares. And he is getting a little leary of this guy Feinberg at that point, * * *"

The fact is that Mintzer did not testify at all and there was no such testimony with respect to Mintzer.

The Circuit Court of Appeals recognized that the conduct of the Prosecuting Attorney exceeded proper bounds, but disregarded its effect by saying that it "was within the regrettable latitude which has long been common" (R. 1560).

The question is not whether the jury convicted because of the prejudice created by the Prosecuting Attorney, but rather whether because of it the accused were deprived of their right to an impartial trial.

> See *United States* v. *Vierick*, 318 U. S. at 247;
> *People* v. *Malkin*, 250 N. Y. at p. 200;
> *United States* v. *Berger*, 295 U. S. at p. 88.

Point II.

The fiscal reports of the American Beverage Corporation for the years ending November 30, 1939 and November 30, 1940 were improperly admitted and seriously prejudiced the rights of the petitioners.

These reports contained the balance sheet and profit and loss statement of the company covering the two year periods following the purchase by Prendergast-Davies Company, Ltd. of the controlling stock of American Beverage Corporation. The prosecutor admitted that he was not charging the petitioners with losses sustained by the company in its operation; but, despite that declaration, his obvious purpose was to create the impression that the petitioners had obtained control of American Beverage Corporation in order to milk the company for their own personal benefit. His remarks in his summation were very serious in their effect. The following appears:

> (R. 1157) "* * * The stockholders of this company left their money in charge of reputable people whom they knew, and nothing went wrong with it up to then. They came, this pack of wolves moved in here and started cutting the heart out of the company, just like letting a wolf loose in a nursery."

The Circuit Court of Appeals, in its opinion, stated flatly that the admission of these reports was error but refused to give them its full effect by these words:

> (R. 1559). "True, we cannot say that its admission could have done the accused no damage * * * yet it would be wholly unwarranted to reverse the conviction because of so trifling a single lapse in the course of so long a trial."

But, what is overlooked by the Circuit Court of Appeals is that this was not a single lapse. The unfair conduct of

the Prosecuting Attorney in the instances above set forth (and others too numerous to mention here), prejudicing the petitioners as it did, taken together with the fact that American Beverage Corporation lost money during 1939 and 1940 might well have turned the minds of the jury to thinking that those losses were the result of deliberate wrongful acts of these petitioners, rather than losses because of business conditions which, admittedly, were no fault of these petitioners.

It should also be added that neither of these petitioners was a director or officer of American Beverage Corporation during the year 1940.

Point III.

The books of the Company were improperly admitted.

When the books were first offered for identification by the Government counsel, it was clearly stated by the petitioners' counsel that they had no objection to the same being marked for identification.

> (R. 85, 86). "Mr. Rubin. If your Honor pleases, we have a large number of books and records of the three companies that are involved in this case. To save time, I would like to offer for identification the books that are on the table there, of which I have in my hand a list, with the understanding that they will be numbered consecutively for identification, and that the books and records will be marked during the recess tomorrow, so as to save the time of the Court and the jury and of counsel. Is there any objection to that?
>
> Mr. Kleid: What books are they?
>
> Mr. Rubin: They are the books of C. H. Graves & Sons Company, C. H. Graves & Sons Distillers, Inc., Prendergast, Davis Company, Ltd., and American Beverage Corporation.
>
> Mr. Kleid: *Are these only for purposes of identification?*

Mr. Rubin: That is what I stated, Mr. Kleid.

Mr. Kleid: I just wanted to be clear on that; no offense. For the purposes of identification, I have no objection, provided these are all the books of the companies; I don't know.

The Court: If not, you can put in others if you want to.

Mr. Kleid: I do not know where they are.

Mr. Rubin: If your Honor pleases, I now suggest to counsel that they may wish to stipulate that these books and records, as reflected on this list which I will hand to counsel, are the books and records so indicated of those companies, subject to verification; the books and records will be in court; they will be available and they can be verified.

Mr. Kleid: I have no objection to these books being marked for identification. *I am not familiar with these books, and, therefore, I am in no position to state now that these are the books of the company or all the books of the company, but for the purpose of this trial, I have no objection to their being marked for identification.*

Mr. Rubin: If your Honor pleases, I am asking counsel whether counsel will stipulate——

The Court: If you want him to stipulate, talk to him, but the jury is not concerned with this.

(Discussion off the record.)

Mr. Rubin: Counsel advises me it is stipulated that those are the books of the companies on this list, subject to verification.

The Court: And it is not necessarily all of the books.

Mr. Rubin: Those on the list."

Thereupon, Government counsel handed to the Court Clerk a typewritten list of said books. When the Government counsel stated that it had been "stipulated that those are the books of the companies on this list, subject to verification" (R. 86), those words could only mean subject to Government counsel going forward with the

burden, i.e., showing that those were the books of the companies, and that the entries therein were made in the regular course of business.

Although these books were offered for identification at the outset of the trial, neither they nor figures therefrom were used by the Government counsel until two weeks later when he examined the Government's accountant relative to said books. It was then that the petitioners' counsel objected to his testifying unless the books were first in evidence; and then, for the first time, the Government counsel offered the books in evidence and objection was made to their admissibility, not solely upon the ground, stated by the Circuit Court, "that it had not been shown that the books had been kept in the regular course of business" (R. 1557), but, as well, on the ground that it had not been shown that these were the books of the respective companies.

> (R. 912, 913) "Mr. Kleid: We object to it on the ground that unless testimony is offered here to the effect that these books were kept in the regular course of business and are the books of the respective companies, they are inadmissible."

The Circuit Court of Appeals, in its opinion, correctly stated "that these computations were a vital part of the case, and that they were incompetent, unless the books themselves were competent" (R. 1557). The interpretation put upon language of counsel by the Circuit Court had no basis in law or in fact.

It is to be noted that the Circuit Court, in reaching its decision that the books of Prendergast-Davies Company, Ltd. and the Graves Companies were admissible against Mark Godfrey, stated that Godfrey had helped in the preparation of the offer submitted to American Beverage Corporation by Prendergast-Davies Company,

Ltd. (R. 1559). However, there is not a scintilla of evidence in the record to support a conclusion and hence, as to Godfrey, the error was even more prejudicial.

POINT IV.

The writ of certiorari should issue.

Respectfully submitted,

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